UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CAESARS ENTERTAINMENT CORP. D/B/A RIO ALL-SUITES HOTEL AND CASINO Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO Charging Party.	)	Case No. 28-CA-060841

OPPOSITION TO MOTION TO CORRECT
OR REJECT POSITION OF GENERAL COUNSEL

Respondent Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino ("Rio" or the "Company") respectfully opposes the motion of the charging party, International Union of Painters and Allied Trades, District Council 15, Local 159, AFL-CIO ("Union"), to correct or reject the position of the General Counsel to the National Labor Relations Board ("Board" or "NLRB"). On May 11, 2017, the Board, through its General Counsel, filed a partial application for enforcement in the United States Court of Appeals for the Ninth Circuit. On December 19, 2017, the Union filed a petition for review in the Ninth Circuit. On January 9, 2018, the court consolidated the Board's application and the Union's petition. On February 8, 2018, the Board filed a motion for partial remand with the court so that the Board could apply its decision in *The Boeing Company*, 365 NLRB No. 154 (2017) to the case. The Union's motion

should be denied in its entirety. For at least four reasons, the Union's motion is an unsupportable collateral attack on the Board's motion for partial remand.

First, the Union's motion implies that *Boeing* is somehow invalid because Member Emanuel should have recused himself. But, as a threshold, the Union does not have standing to collaterally attack *Boeing*. The Board's remedial power "exists only to redress or otherwise to protect against injury to the complaining party, even though the . . . judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Union was not named in the *Boeing* complaint. Nor does the Union contend that it had a representative relationship with any party to the *Boeing* proceedings. If it is the Union's position that it had a right to relief in the *Boeing* proceedings, then the Union should have intervened. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("intervention is the requisite method for a nonparty to become a party to a lawsuit."). Otherwise, the Union has never had standing to challenge *Boeing*.

Even if the Union could somehow establish a justiciable interest in the *Boeing* proceedings, the Union cannot use this case to collaterally attack *Boeing*. This case is based on a separate complaint with distinct parties. A third-party collateral attack on an order or judgment in a separate proceeding is nonjusticiable. *See Brown v. United States*, 196 F.2d 777, 778 (D.C. Cir. 1952) (holding nonparty did not have "present right and standing to make this collateral attack against [prior court order]"). Accordingly, regardless of the Union's standing to challenge the Board's findings in *Boeing*, the Union's collateral attack in this case is nonjusticiable.

Second, the Union's motion cites no facts and fails to articulate a cogent theory for why Member Emanuel should have recused himself from *Boeing*. Under the ethical rules, a Board Member may not "participate in any particular matter involving specific parties that is directly

and substantially related to [his or her] former employer or former clients." Exec. Order No. 13770, § 6, 82 Fed. Reg. 9333 (Jan. 28, 2017). No fact has been alleged that Member Emanuel or his firm represented the charged party in *Boeing* or in this case. Nor has it been alleged that either matter affects the "legal rights of the parties or an isolatable transaction or related set of transactions between identified parties" that Member Emanuel or his firm represented. 5 C.F.R. § 2641.201(h)(1) (2008). The Union's suggestion that Member Emanuel should have recused himself from deciding *Boeing* is thus baseless.

Third, the Union's motion is self-defeating. Rio contests that the court properly has jurisdiction over the case. It has been the Board's position that the court, not the Board, has jurisdiction over the case. As a result, the Board has declined to rule on substantive motions since filing its application for enforcement in court. If the Board changes course, grants the Union's motion, and decides that remand is improper because *Boeing* is inapplicable, then the Board and the Union will be judicially estopped from arguing that the court has exclusive jurisdiction to decide the case. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"). In other words, by granting the motion, the Board will effectively concede that the court does not have exclusive jurisdiction to enforce the Board's decision in this case.

Fourth, it is settled law that "a court reviewing an agency decision following an intervening change of policy by the agency should remand." *NLRB v. Food Store Emps. Union, Local 347*, 417 U.S. 1, 10, n.10 (1974). Contrary to the Union's representation in its motion, courts recognize that "the agency should" move to remand when it "changes a policy or rule underlying a decision pending review." *Williston Basin Interstate Pipeline Co. v. FERC*, 165

F.3d 54, 62 (D.C. Cir. 1999). In at least one other case, the Board successfully moved a federal court of appeals to remand findings "to reconsider them in light of the new *Boeing* test." *The Daily Grill v. NLRB*, No. 16-1238, 2018 WL 1052613, at *1 (D.C. Cir. Jan. 29, 2018). There is no reason why the Board should treat this case differently. The Union has offered no reason.

For these reasons, Rio requests that the Board deny the Union's motion to correct or reject the position of the general counsel.

Respectfully submitted this 5th day of March, 2018.

By: 

Lawrence D. Levien
James C. Crowley
AKIN GUMP STRAUSS HAUER & FELD, LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
Telephone: (202) 887-4000
Fax: (202) 887-4288

Counsel for Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino

CERTIFICATE OF SERVICE

This is to certify that the undersigned caused to be served on March, 2018, a copy of the Opposition to Motion to Correct or Reject the Position of the General Counsel via electronic mail to the following:

Cornele A. Overstreet
Regional Director National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Stephen Kopstein
Larry A. Smith
Counsel for the General Counsel National Labor Relations Board – Region 28
300 South Las Vegas Boulevard, Suite 2-901
Las Vegas, NV 89101
larry.smith@nlrb.gov

Linda Dreeben
Attn. Usha Dheenan and Eric Weitz
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
linda.dreeben@nlrb.gov
Usha.Dheenan@nlrb.gov
Eric.Weitz@nlrb.gov

David A. Rosenfeld
Caren Sencer
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
drosenfeld@unioncounsel.net
csencer@unionlaw.net

Lawrence D. Levien
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4000 (telephone)
(202) 887-4288 (facsimile)

Counsel for Caesars Entertainment Corporation
d/b/a Rio All-Suites Hotel and Casino